

ARKANSAS SUPREME COURT

No. 07-1181

Opinion Delivered January 31, 2008

JOHN A. BUFFINGTON
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE MOTIONS FOR RULE ON
CLERK AND FOR APPOINTMENT OF
COUNSEL [CIRCUIT COURT OF HOT
SPRING COUNTY, CV 2007-193, HON.
CHRIS E. WILLIAMS, JUDGE]

MOTION FOR RULE ON CLERK
TREATED AS MOTION FOR
BELATED APPEAL AND DENIED;
MOTION FOR APPOINTMENT OF
COUNSEL MOOT.

PER CURIAM

In 2007, while incarcerated in Hot Spring County, petitioner John A. Buffington filed in the circuit court in that county a pro se petition for writ of habeas corpus, claiming that he had been sentenced illegally in 2005 for a 2003 conviction. The circuit court entered an order on August 9, 2007, that dismissed the habeas petition. On August 27, 2007, petitioner filed in the circuit court a notice of appeal from an order entered on “August 20, 2007.” As the record did not contain an order entered on that date, the clerk of this court correctly declined to lodge the appeal when the record on appeal was tendered to this court.

Now before us is petitioner’s pro se motion for rule on clerk under Ark. Sup. Ct. R. 2-2(b) seeking to proceed with the appeal of the August 9, 2007, order. He has also filed a pro se motion for appointment of counsel. As the notice of appeal filed in the trial court did not designate the August 9, 2007, order, we treat the motion for rule on clerk as a motion for belated appeal. *See*

Johnson v. State, 342 Ark. 709, 30 S.W.3d 715 (2000) (per curiam); *see also Muhammed v. State*, 330 Ark. 759, 957 S.W.2d 692 (1997) (per curiam).

A petitioner has the right to appeal a ruling on a petition for postconviction relief which includes the dismissal of a petition for writ of habeas corpus. *See Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (per curiam). However, along with that right goes the responsibility to follow proper procedure. The burden is on the petitioner to make a showing of good cause for the failure to comply with proper procedure. *See Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (per curiam). The fact that a petitioner is proceeding pro se in itself does not constitute good cause for the failure to conform to the prevailing rules of procedure. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984) (per curiam); *see also Sullivan v. State*, 301 Ark. 352, 784 S.W.2d 155 (1990) (per curiam).

Even if it could be said that petitioner merely erred in citing the correct date of the final order, petitioner could not be successful on appeal. Accordingly, we deny the motion for belated appeal and the motion for appointment of counsel is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam).

The record indicated that in 2003, appellant entered a plea of guilty to second-degree sexual assault as part of a plea agreement and was sentenced by the Ouachita County Circuit Court to 120 months' imprisonment. On December 8, 2003, a judgment and commitment order was entered that reflected the sentence he received. An amended judgment and commitment order, entered on August 19, 2004, deleted the notation that appellant was on parole at the time of his conviction. A second

amended judgment and commitment order was entered on August 15, 2005.¹ The 2005 judgment included the requirement that appellant register as a sex offender and erroneously noted that appellant entered his guilty plea on December 8, 2004, rather than the correct date of December 8, 2003.

Appellant's petition for writ of habeas corpus listed myriad bases for relief, including double jeopardy, deprivation of due process and lack of jurisdiction by the trial court to modify a sentence that had been put into execution. The gravamen of his complaint was that the second amended judgment improperly included the requirement that he register as a sex offender, thereby illegally modifying and increasing the sentence imposed in 2003. He further maintained that he was not apprised by the trial court as to the maximum sentence he could receive, which included registration as a sex offender.

Appellant's claim for relief was premised upon an incorrect assumption as to the nature and application of the Sex Offender Registration Act of 1997, presently codified at Ark. Code Ann. §12-12-901 – 12-12-923 (Supp. 2007). Rather than being "sentenced" under the act, we have held that the registration and notification components of the act are regulatory and "not a form of punishment[.]" *Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 287, 5 S.W.3d 402, 410 (1999). Further, under section 12-12-906(a)(1)(A), trial courts have been required to designate criminal defendants who were convicted of certain crimes to register as sex offenders.

Here, appellant was convicted of second-degree sexual assault which was a designated crime at the time appellant was sentenced. Section 12-12-903(12)(A)(i)(d) (Supp. 2003). The trial court had no discretion as to the application of the act to appellant's conviction and its failure to note the

¹Appellant's pleading in this matter indicated that the first amended judgment was entered after petitioner filed a second petition for relief under Ark. R. Crim. P. 37.1. However, the record did not contain a definitive explanation as to what prompted the judgment to be amended for either the first or second time.

requirement of appellant's compliance with the act in the original judgment amounted to a clerical error. Furthermore, when the trial court entered the second amended judgment to correctly add the statutorily-mandated requirement that appellant register as a sex offender for potential notification purposes, the sentence of incarceration he received for sexual assault was not modified or increased. Appellant failed to show that he was entitled to relief under any theory cited in his petition.

Motion for rule on clerk treated as motion for belated appeal and denied; motion for appointment of counsel moot.